



**Kamunyu v Maingi & another (Civil Appeal E011 of 2023)
[2023] KEHC 24180 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E011 OF 2023
DAS MAJANJA, J
OCTOBER 24, 2023**

BETWEEN

GEORGE THUITA KAMUNYU APPELLANT

AND

MARY MAINGI 1ST RESPONDENT

SANTA-FE WORLD TRAVEL 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Kelly, SRM dated 28th February 2023 at the Magistrates Court, Naivasha in Civil Suit No. E614 of 2021)

JUDGMENT

1. This appeal is against the finding on quantum of damages awarded by the Subordinate Court. The Appellant was involved in a road traffic accident that occurred on June 26, 2021 along the Nairobi - Naivasha road between motor vehicle KCR 298M and KCF 358H in which he was a passenger. As a result of the accident, the Appellant suffered injuries. The trial court found the Respondents fully liable and awarded Kshs. 500,000.00 and Kshs. 182,526.00 as general and special damages respectively.
2. The appellant was dissatisfied with the finding of the trial court and has preferred this appeal which is grounded on the memorandum of appeal dated March 6, 2023 as follows:
 1. That the learned Magistrate erred in law and in fact by awarding judgment on quantum that was too low when there was overwhelming evidence to support the appellant's case.
 2. That the learned trial magistrate erred in law and in fact by failing to consider the Plaintiff/Appellant's submissions on quantum payable and therefore



awarding general damages which were too low comparable to the injuries suffered by the appellant.

3. That the learned trial magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before her.
3. The appeal was canvassed by way of written submissions. The Appellant submits that the amount of Kshs. 500,000.00 awarded by the trial court as general damages is too low compared to the injuries suffered. He prays for an award of Kshs. 1,500,000.00. He relies *Teresiah Ngugi & another v Michael Masia Kimende* [2018] eKLR which is the only decision he cited before the trial court. The other cases cited before this court are *George William Awuor v Beryl Awuor Ochieng* [2020]eKLR and *Francis Ndung'u Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019]eKLR which have been filed on appeal but were not brought to the attention of the trial court.
4. On the other hand, the Respondents support the finding of the trial court and urges this court not to interfere with the same. They submit that the case relied on by the Appellant before the trial court did not bear any relationship to the injuries suffered by the Appellant. They urge that the Appellant doomed his own case by failing to provide relevant authorities to guide the trial court. Citing *Tarasila Wanja & another v Peter Kirimi Muthuri* [2014] eKLR they urge this court to disregard the new authorities provided by the appellant and maintain that the authorities provided by them before the trial court were more relevant and comparable to the injuries suffered by the appellant. They distinguish the case of *Teresiah Ngugi & another v Michael Masia Kimende* (*supra*) relied on by the Appellant before the trial court by stating that the plaintiff in that case suffered permanent disability while in the present case, there was no assessment of permanent disability.
5. This is an appeal against the assessment of damages. The general principle upon which an appellate court can interfere with an award of damages was stated in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where it stated that, "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low."
6. In awarding general damages, the court has to consider both the nature and extent of the injuries suffered and the comparable awards made in the past as was held in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR. From the medical examination report by Dr. Kiamba and set out in the report dated 30.09.2021, the appellant sustained injuries in form of fracture to the right tibia plateau and tibia shaft, fracture of the left tibia plateau and segmental shaft fracture, severe soft tissue injuries to the neck and cut wound on the right eye upper lid. At the time of examination which was done about three months after the accident, the appellant was experiencing pain, stiffness and swelling on the lower limbs and was not able to use them. He was thus confined on a wheelchair at the time. The doctor noted that though he would recover, the appellant would eventually develop post traumatic osteoarthritis of the knee joint and may require knee replacement. All these factors were noted by the trial magistrate.
7. Regarding comparable awards made, the trial court was of the view that the authorities cited by both the Appellant and the Respondent differed greatly from the injuries sustained. The court did not however make its assessment in a vacuum, rather, it found other cases which it believed resonated closer with the present case. In the case of *Isaac Muriungi Mbataru v Silas Kalumani* [2017]eKLR, where the Plaintiff had sustained right femoral fracture, tibia plateau fracture, blunt head injury and blunt neck injury, the High court reduced an award of Kshs. 350,000.00 in general damages to Kshs. 200,000.00 but did not uphold the award at Kshs. 350,000.00 as posited by the trial court.



8. That notwithstanding, my consideration of the injuries suffered, the authorities presented by the parties and the authorities relied on by the court, I do not find any misapprehension of the material facts or evidence to warrant interference with the decision of the court. The court was keen to make an assessment based on prevailing awards relating to the injuries suffered. The award is not an outlier and I thus find no reason to interfere. I would also add that the trial magistrate was properly guided by the decisions cited.
9. Regarding special damages, the trial court observed that the funds yielded through fundraising to cover part of the bill were not recoverable since they were not personally incurred by the appellant. In *Leli Chaka Ndoro v Maree Ahmed and S. M. Lardbid* [2017] eKLR, the court rejected the argument and called in aid the collateral benefit rule summarised in *George White v Jubitz Corporation* 219 Or. App. 62 (Or. Ct. App. 2008) where the Supreme Court of Oregon stated that, “Damages cannot be reduced by an amount which the plaintiff may have received from third parties, acting independently of the defendant, though it is given to the plaintiff on account of the injury. For it is given as a pure gift, not intended by the giver to be in lieu of damages, or else it is given in performance of a contract, the consideration of which was furnished by the plaintiff. In neither case has the defendant any equitable or legal claim to share the benefit...” It added, “The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor. The common-law collateral source rule does not concern itself with whether a plaintiff actually obtains a “double recovery.”
10. Thus the subordinate court could not deny the appellant special damages pleaded and proved merely because he was assisted by well-wishers. In *David Njoroge Muchiri v Berry Farms Limited & 3 others* [2006] eKLR the court awarded special damages to the tune of Kshs. 753,051.00 yet Kshs. 734,764.00 of the total amount was raised through fundraising. I would thus include the amount of KShs. 50,000/- in the special damages.
11. In the final analysis, I uphold the judgment of subordinate court with regard to general damages, set aside the award for special damages and substitute it with an award of Kshs. 282,476.00. The Respondent shall pay costs of the appeal assessed at Kshs. 20,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIVASHA this day 24th of OCTOBER 2023.

G. K. NZIOKA

JUDGE

